THE HON'BLE MR JUSTICE RAMESH RANGANATHAN

WRIT PETITION No.3787 of 1995

Dated 06-03-2006

Between:

M/s. Sarada Engineering Co.

..... PETITIONER

AND

M.A.Sattar & another.

.....RESPONDENTS

THE HON'BLE MR JUSTICE RAMESH RANGANATHAN

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WRIT PETITION No.3787 of 1995

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O R D E R:

In the present writ petition, the order of the Labour Court-III, Hyderabad, in I.A.No.210 of 1994 in I.D.No.156 of 1993, is sought to be quashed and a consequential direction is sought to set aside the *ex parte* award passed on 20-10-1993 in I.D.No.156 of 1993.

Brief facts, to the extent necessary, are that the first respondent herein filed I.D.No.156 of 1993 on the file of the Labour Court-III, Hyderabad, contending that his termination amounted to victimization and was an unfair practice. The respondent-

workman alleged that no enquiry was held and that his services were terminated without following rules and regulations. The petitioner herein, filed its counter, and contended that the first respondent was a habitual absentee, that a show cause notice dated 21-01-1988 was issued, wherein the period of absence and the leave availed by the first respondent were specified and that the first respondent submitted his explanation thereto on 24-02-1988, giving reasons for his absence, and had given a written undertaking permitting the petitioner to terminate his services unconditionally if he committed any further default in attending duty. Based on the first respondent's explanation, an enquiry was conducted and thereafter his services were terminated. Petitioner would submit that the first respondent filed I.D.No.156 of 1993 before the Labour Court and since he did not evince any interest in leading evidence, the I.D. was dismissed for default on 29-06-1980. The first respondent herein filed I.A.No.279 of 1989, which was allowed by the Labour Court, by order dated 02-07-1989, without notice to the petitioner. According to the petitioner, evidence of the first respondent was recorded on 19-06-1993 in three lines, at his request the matter was adjourned, he was recalled and examined on 18-10-1993 and his examination in chief was concluded. According to the petitioner, his counsel Sri S.Subrahmanyam had informed him that he would be informed as to when his presence was essential as the first respondent-workman was not diligent in prosecuting the case. Petitioner would submit that he was under the bonafide impression that his counsel would inform him of the date on which he was required to be present in Court and he, therefore, did not appear before the Labour Court on the date on which the I.D. was adjourned. Petitioner would submit that their counsel Sri S.Subrahmanyam expired in April, 1993 and this fact was brought to the notice of the Labour Court. During this period, the petitioner company was under severe financial crisis as there was litigation, between the petitioner company and persons to whom goods were supplied, the business of the petitioner-Company was completely shut, and the serious crisis in the Company resulted in deterioration of the health of the managing partner, Sri B.Venugopal, and he was under constant medical check up. Petitioner would submit that they were also not aware, till much later, that their counsel Sri S.Subrahmanyam, had passed away.

The Labour Court passed an *ex parte* award on 20-10-1993 and immediately after the award was communicated, I.A.No.210 of 1994 was filed to set aside the *ex parte* award. The Labour Court, while dismissing the I.A., by its order dated 09-05-1994, held that absence of the advocate, on the date of hearing, was not a ground to

set aside the ex parte award. The Labour Court held that the judgment of this Court in **G. Veera Venkamma v. M. Venkataramayya,** was over ruled by the judgment of the Supreme Court in AIR 1983 SC 1400**.** The Labour Court held that the docket sheets in the case disclosed that right from 06-05-1993, several adjournments were given, that the evidence of the workman was recorded in part on 19-06-1993 and then adjourned from time to time, that the advocate Sri S.Subrahmanyam is said to have died in April, 1993 and after a lapse of four months, the evidence of the workman was completed and even then no interest was evidenced by the management. The Labour Court went into the merits of the matter and taking the view that the management intended only to prolong the litigation, dismissed the application.

In **G. Veera Venkamma** [1], this Court held thus:

"……The matter is governed by Order 9, Rule 13 of Civil Procedure Code. Outside those provisions, an ex parte decree brought about by a defaulting party neglecting to be present in the Court cannot be set aside. This Court has therefore a duty to examine whether those statutorily laid down conditions are satisfied in a particular case or not. It follows that the discretion of the lower Court is not an un-reviewable discretion. This leads us to examine the validity of he ground on which the ex parte decree has been set aside……..

…….Order 9, Rule 13, C. P. C. speaks only of a party to the judicial proceedings and his absence occasioned by sufficient cause as constituting legal justification for setting aside an ex parte decree and does not at all refer to a counsel or his convenience. It is so because counsel's convenience not regarded as a relevant ground. As a mere matter of construction of Order 9, Rule 13 it follows that law does not recognize counsel's inability or inconvenience to be present in the Court for setting aside an ex parte decree. To set aside an ex parte decree on any such ground would amount to adding one more ground to the grounds permitted by law. That would be clearly impermissible. In general theory also there appears to me to be no warrant to do any such thing. An advocate is an agent of a party to a judicial proceedings. So long as he acts as such an agent and is ready and willing to conduct the case and help the Court the Court is bound to hear him with attention and respect. But when an advocate totally abstains himself from the Court or for one reason or the other is unwilling to go on with the case and perform his duties undertaken by him on behalf of his client, the right of audience to which he was entitled, would stand forfeited and the bond that connects him to the Court would be snapped. Law would only recognize his presence and takes no note of his absence……"

It is interesting to note that while the Labour Court records that the judgment of this Court in **G.Veera Venkamma**[1] was overruled by the Supreme Court in AIR 1983 SC 1400, the AIR 1983 Supreme Court volume ends with page No.1328 and no judgment at page No.1400 is in existence. As laid down by this Court in

G.VeeraVenkamma[1], the discretion exercised by the Labour Court in this regard is reviewable.

In **Rafiq v. Munshilal**, the Supreme Court held thus:

"The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A. K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. May be, we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A. K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs. 200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A. K. Sanghi."

In **Lachi Tewari V. Director of Land Records,** the Supreme Court following its earlier judgment in **Rafiq**[2] and **Goswami Krishna Murarilal Sharma V. Dhan Prakash,** set aside the order of the High Court wherein it was held that absence of

an advocate was not a ground for setting aside the ex parte order.

While absence of counsel, would certainly be a ground required to be taken into consideration by the Labour Court, in deciding whether or not an ex-parte award should be set aside, in the present case, the request to set aside the ex parte award is not on the ground of the advocate's absence, but on the plea of the advocate's demise. While the Labour Court holds that from 06-05-1993, several adjournments were given, it also takes note of the fact that the advocate, Sri S.Subrahmanyam, is said to have died in April, 1993, which is clearly prior to 06-05-1993, after which date alone several adjournments are said to have been granted.

In **Kavali Narayana v. Kavali Chennamma**, this Court held thus:

"The delay, which appears to be enormous, on the face of it, was caused mostly on account of the death of the advocate, who was first engaged by the petitioners, and lack of proper communication from their advocate engaged thereafter. The suit itself was filed for partition of the shares of the father of the respondent on the one hand and the father of the petitioners on the other. She has taken decades to file the suit and the disposal of the suit was delayed for years together on account of her own inaction. On condonation of delay, if at all anything, the matter would be decided on merits and no actual detriment can be said to have been suffered by the respondent. The inconvenience, if any, caused to the petitioners (sic. Respondent) can be compensated by awarding costs."

The Labour Court did not examine as to whether the advocate's demise had resulted in the petitioner's inability to be present before it or to prosecute the I.D. diligently. Since the Labour Court had not examined these relevant issues, this Court, normally, would have set aside the order and remanded the matter back to the Labour Court for fresh consideration in accordance with law.

One fact which is, however, required to be taken note of is that the application, in I.A.No.210 of 1994 to set aside the ex parte award dated 20-10-1993, was filed on 07-03-1994, beyond 30 days after the award was published. The Supreme Court in **Grindlays Bank Ltd V. Central Government Industrial Tribunal**, held thus:

"The contention that the Tribunal had become functus officio and, therefore, had no jurisdiction to set aside the ex parte award and that the Central Government alone could set it aside does not commend to us. Sub-section S. 20 of the Act provides that the

proceedings before the Tribunal would be deemed to continue till the date on which the award becomes enforceable under S. 17-A. Under S. 17-A of the Act, an award becomes enforceable on the expiry of 30 days from the date of its publication under S. 17. The proceedings with regard to a reference under S. 10 of the Act are, therefore, not deemed to be concluded until the expiry of 30 days from the publication of the award. Till then the Tribunal retains jurisdiction over the dispute referred to it for adjudication and up to that date it has the power to entertain an application in connection with such dispute. That stage is not reached till the award becomes enforceable under S. 17-A. In the instant case, the Tribunal made the ex parte award on December 9, 1976. That award was published by the Central Government in the Gazette of India dated Dec. 25, 1976. The application for setting aside the ex parte award was filed by respondent No. 3, acting on behalf of respondents Nos. 5 to 17 on January 19, 1977 i. e., before the expiry of 30 days of its publication and was, therefore, rightly entertained by the Tribunal. It had jurisdiction to entertain it and decide it on merits. It was, however, urged that on April 12, 1977 the date on which the impugned order was passed, the Tribunal had in any event become functus officio. We cannot accede to this argument. The jurisdiction of the Tribunal had to be seen on the date of the application made to it and not the date on which it passed the impugned order. There is no finality attached to an ex parte award because it is always subject to its being set aside on sufficient cause being shown. The Tribunal had the power to deal with an application properly made before it for setting aside the ex parte award and pass suitable orders."

In **Anil Sood & Ors. V. S.K.Sarvaria & Ors**., the Division Bench of the Delhi High Court following the judgment of the Apex Court in **Grindlays Bank Ltd**[6] held that the Tribunal becomes functus officio after the expiry of the period of 30 days from the date of publication of the award and, therefore, has no jurisdiction to set aside the ex parte award. In **Anil Sood V. Presiding Officer, Labour Court-II**, the Supreme Court held that an ex parte award without notice is a nullity and since the Tribunal would have no jurisdiction to proceed, it must necessarily be said to have the power to set aside the ex parte award.

In **Nellore District Co-operative Central Bank Ltd. V. President, Nellore Dt. Co-op. Central Bank Employees Association, Nellore**, this Court following the judgment of the Apex Court in **Satnam Varma V.Union of India**, held thus:

"No doubt in both the cases referred to above the application to set aside the ex parte award was made before the expiry of 30 days but not after expiry of 30 days. Sub-section (3) of Section 20 of the Act provides that the proceedings before the Tribunal would be deemed to continue till the date on which the award becomes enforceable under Section 17-A. That means, during the pendency of the proceedings, a workman cannot be discharged as contemplated under Section 33. That is only the legal fiction for the purpose for which it is created by the Legislature by incorporation sub-section (3) of Section 20. Under Rule 30 of A.P. Industrial Disputes Rules, 1958 which was substituted in 1983, the

Board, Labour Court, Tribunal, National Tribunal or Arbitrator may at any time correct any clerical mistake or error arising from an accidental slip or commission in any proceedings, report, award or decision either of its or his own motion or on the application of any of the parties. In a given case, if the Labour Court proceeds ex parte by accidental omission by recording that summons are duly served, it is always open for the Labour Court to correct the said mistake committed by it and the error arising from accidental slip or omission in any proceedings has wider meaning but it cannot be restricted to clerical mistake. In the case of Grindlays Bank Ltd., (2 supra), the Apex Court in its judgment held that the Tribunal has not only the power but also the duty to set aside ex parte award and to direct the matter to hear afresh and the power to proceed ex parte under Rule 22 (Central) carries with it the power to enquire whether or not there was sufficient cause for the absence of a party at the hearing. The same view was approved by the Supreme Court in the subsequent case i.e., Satnam Varma (6 supra). This Court in the case of APSRTC V. K.Bhoomaiah (1987(2) LLN 240 (AP) held that the Labour Court does not become functus officio on expiry of 30 days from the date of publication of the award and will have ancillary or incidental power to set aside the award if sufficient cause is shown while making an application under Order IX Rule 13 of the Code of Civil Procedure. In view of the same the Labour Court is not right in coming to the conclusion that the application filed by the petitioner-Management to set aside an
ex parte award after expiry of 30 days of its publication cannot be entertained as the Labour Court will become functus officio on expiry of 30 days in view of the law laid down by the Apex Court and this Court."

This Court, thereafter, examined as to whether the petitioner-management had shown sufficient cause for condoing the delay in setting aside the ex parte award and on the facts of the said case, came to the conclusion that sufficient cause was not shown. The judgment of this Court in **Nellore District Co-operative Central Bank Ltd.**[9] was set aside in appeal by the Division Bench of this Court in **Nellore District Co-operative Central Bank Ltd. V. President, Nellore Dt. Co-op. Central Bank Employees Association, Nellore**, wherein after referring to the judgments of the Apex Court in **Grindlays Bank Ltd** [6] and **Satnam Varma**[10], this Court held thus:

"In the instant case the following facts are not in dispute. The award was passed on October 31, 1995. In terms of Rules 24 and 26 of the Industrial Disputes (Andhra Pradesh) Rules Order IX, Rule 13 of the Code of Civil Procedure was applicable. Thus the said application for setting aside the *ex parte* award could have been filed upto Novemebr 31, 1997. The award was published on December 17, 1997. Thus the application which was filed 40 days beyond the period of limitation was not after the award became final as the period of 30 days has not been passed from the date of publication of the award. The judgment of the learned single Judge, therefore, on that ground is unassailable. However, keeping in view the fact that the learned Labour Court refused to exercise its discretion on

the ground that it had no jurisdiction to condone the delay as it became *functus officio* and the same having not found favour by the learned single Judge, in our considered opinion, the learned single Judge ought not to have usurped the jurisdiction of the Labour Court in considering the matter on merits. Whether there has been a sufficient cause for not approaching the Labour Court in time or not was not a matter which was required to be gone into in the writ proceedings for the first time. In a case of this nature disputed question of fact may arise which may be determined only upon adduction of oral and documentary evidence. In that view of the matter, in the opinion of this Court the learned single Judge out to have remitted the matter back to the Labour Court."

After holding that the application filed to set aside the award was within the time limit prescribed, the Division Bench was of the view that the learned Judge ought to have remitted the matter to the Labour Court and issued a direction to the Labour Court to consider the application for condonation of delay on its own merits.

In **Sangham Tape Co. v. Hans Raj**, the Supreme Court held thus:

An industrial adjudication is governed by the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") and the Rules framed thereunder. The Rules framed under the Act may provide for applicability of the provisions of the Code of Civil Procedure. Once the provisions of the Code of Civil Procedure are made applicable to the industrial adjudication, indisputably the provisions of Order 9 Rule 13 thereof would be attracted. But unlike an ordinary civil court, the Industrial Tribunals and the Labour Courts have limited jurisdiction in that behalf. An award made by an Industrial Court becomes enforceable under Section 17-A of the Act on the expiry of 30 days from the date of its publication. Once the award becomes enforceable, the Industrial Tribunal and/or Labour Court becomes functus officio.

It is the admitted case of the petitioner herein that the application filed, to set aside the *ex parte* award, was beyond the period of 30 days after the award was published in the gazette and since the Labour Court had become functus officio, the application could itself not have been entertained by the Labour Court.

The next question which requires examination is whether this Court, in proceedings under Article 226 of the Constitution of India, should consider the application, seeking condonation of delay in filing the application to set aside the *ex parte* award, on merits.

In **Narayan v. Government of India**, the High Court of Karnataka held thus:

"There can be no dispute that there is power vested with the High Court under Article 226 to remand a case to the Industrial Tribunal for fresh adjudication if sufficient cause has been

shown. In this particular case the impugned order at Annexure – A clearly reveals that sufficient cause has been shown. There is a clear finding by the Industrial Tribunal in the following words:

> "On facts I therefore find that the petitioner has shown sufficient reason for his non-appearance when the matter was called a Hubli sitting on August 29, 1985."

Taking into account, the various issues raised in this Writ Petition, I am of the view that the High Court undoubtedly has power to remand the matter back to the Industrial Tribunal or to the Labour Court if sufficient cause is shown. In these circumstances and on the facts of this case I have no hesitation in allowing the Writ Petition.
The Writ Petition is accordingly allowed. The order passed by the Industrial Tribunal at Annexure – A and Annexure – B is quashed as contrary to the principles of natural justice and the matter is remitted back to the second respondent in Central Reference Number 1 of 1983. The second respondent will take up the matter and dispose of the Reference as expeditiously as possible.

Both the parties are directed to appear before the second respondent on February 1, 1995 at Bangalore Camp. Both the parties agree that they will cooperate with the second respondent in disposing of the Reference as expeditiously as possible. "

In **R.B. Girap v. M/s. B.G.C. HG. Society Ltd.**, the High Court of Bombay held thus:

"In my judgment it is not necessary to determine in the present proceedings whether application under Rule 26 for setting aside the award was competent or otherwise. It is open for this Court in exercise of powers under Articles 226 and 227 of the Constitution to set aside the award published in the Government Gazette and restore the proceedings to file. It is undoubtedly true that the application was filed beyond the prescribed period of limitation, but taking into consideration the fact that the petitioner is a small employee drawing negligible wages, it would not be in the fitness of things to deny him an opportunity to be heard on merits before the Labour Court. It is undoubtedly true that advice given to the petitioner to wait till the award was published was wholly incorrect, but the petitioner need not be punished for what his advocate erroneously advised him. Taking into consideration all the facts and circumstances of the case, in my judgment it is necessary to set aside the order passed by the Presiding Officer and restore the proceedings to the file of the 5th Labour Court and directing the Labour Court to dispose of the reference on merits."

While it is no doubt true that this Court, in proceedings under Article 226 of

the Constitution of India, would not sit in appeal over the decision of the Tribunal nor would it substitute its views for that of Tribunals or Labour Courts, the power of this Court, under Article 226 of the Constitution of India, is unfettered and is exercised with a view to further the cause of justice. Interference of this Court is called for wherever injustice has resulted. In a genuine case, where a party to the Industrial Dispute is not in a position to file an application before the Labour Court/Tribunal to set aside the *ex parte* award within 30 days of its publication in the gazette, should a party be rendered remediless? Would not injustice ensue if this Court were to refuse to exercise its discretion under Article 226 of the Constitution of India? This Court exercises its jurisdiction under Article 226 of the Constitution of India in larger public interest. While its power remains uncircumscribed, self-imposed fetters restricts its exercise and it is only where a clear case necessitating its interference is made out, would this Court exercise its discretion under Article 226 of the Constitution of India. It has to be borne in mind that while exercising its jurisdiction under Article 226 of the Constitution of India, this Court must subserve ultimately the cause of justice. It is well settled that this Court, in exercise of its jurisdiction under Article 226 of the Constitution, can take congisance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. **[Shangrila Food Products Ltd. v. LIC].**

Do the facts of the present case justify exercise of discretion by this Court under Article 226 of the Constitution of India'. From the aforesaid facts it is seen that the first respondent-workman had himself been set *ex parte* and that the I.D. was dismissed for default on 29-06-1980. The application filed by the workman to restore the I.D. was allowed, by order dated 02-07-1989, without notice to the petitioner herein. The fact that the counsel for the petitioner died in April, 1993 is not in dispute and the Labour Court takes note of this fact while holding that adjournments were granted from 06-05-1993 onwards, which is much after the death of the counsel for the petitioner herein.

I am satisfied that the peculiar facts and circumstances of the present case justify exercise of discretion by this Court under Article 226 of the Constitution of India and that the delay, in filing the application to set aside the *ex parte* award, should be condoned.

Sri Ashok Anand Kumar, learned counsel for the petitioner, would submit that

pursuant to the interim orders passed by this Court in WPMP.No.4658 of 1995, dated 25-01-1999, the first respondent-workman was reinstated into service. While condoning the delay in filing the application to set aside the award, it is made clear that since the first respondent has been reinstated into service and has been working with the petitioner for the last more than six years, the order of this Court condoning the delay in filing the application and restoring I.D. No.156 of 1993 on the file of the Labour Court-III, Hyderabad, is subject to the condition that the enquiry in I.D.No.156 of 1993 is restricted only to the determination of the legality of the order of termination and consequent payment of back wages, and that the earlier order of reinstatement of the workman into service shall not be interfered with. Any view which the Labour Court may take shall not result in the respondent-workman being ousted from employment. I also deem it appropriate to put the petitioner on terms for condoning the delay. The delay, in filing the application to set aside the *ex parte* award, is condoned subject to the petitioner herein paying a sum of Rs.5,000/- (Rupees five thousand only) to the second respondent-workman as costs within four weeks from the date of receipt of a copy of this order. On such payment, I.D.No.156 of 1993 shall be restored to the file of the Labour Court. Since the dispute relates to the year 1989, on I.D.No.156 of 1993 being restored to file pursuant to the orders of this Court, the same shall be heard, as expeditiously as possible, and the Labour Court shall pass an award, in accordance with law, not later than four months from the date of receipt of a copy of this order.

The writ petition is accordingly disposed of. However in the circumstances, without costs.

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06-03-2006

Note:LR copy to be marked

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